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No. 1105

IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

ABRAHAM L. KOOLISH, DAVID F. KOOLISH and JOHN B. CARNELL,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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IN THE

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No.

ABRAHAM L. KOOLISH, DAVID F. KOOLISH and JOHN B. CARNELL,

Petitioners,

VS.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioners Abraham L. Koolish, David F. Koolish, and John B. Carnell pray that the Court issue its writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit, entered in the above-entitled matter on January 25, 1965, which affirmed the judgment of the United States District Court for the District of Minnesota finding petitioners guilty of the crimes of mail fraud and conspiracy. (18 U.S.C. §§ 1341,

CITATIONS TO OPINIONS BELOW.

The opinion of the Court of Appeals (Appendix A, App. 1 to 41) is reported in 340 F.2d 513. The District Court rendered two opinions at prior stages of the present proceeding. The first, which denied petitioners' pretrial motion to transfer on the ground that the inhabitants of the District had been prejudiced against defendants by persistent, provocative, massive, adverse and prejudicial pretrial newspaper, radio and television publicity throughout Minnesota, is reported in 205 F. Supp. 637. (Appendix B, App. 42 to 46.) The second, which denied petitioners' motion for new trial, is reported in 221 F. Supp. 776. (Appendix C, App. 47 to 86.)

JURISDICTIONAL STATEMENT.

The judgment of the Court of Appeals (Appendix D, App. 87) was entered on January 25, 1965. (C.A.R. 42.)*

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* "C.A.R." refers to the pages of the Certified Transcript of Proceedings in the Court of Appeals for the Eighth Circuit.

"R." refers to the pages of the original files from the District Court which comprised part of the Record on Appeal in the Court of Appeals.

"S.R." refers to the pages of the Supplemental Record on Appeal in the Court of Appeals.

"T." refers to the pages of the Transcript of Proceedings in the District Court.

"G. Ex." refers to the government's exhibits.

"D. Ex." refers to petitioners' exhibits.

"App." refers to the pages of the Appendices printed at the end of this Petition.

Pursuant to its rules, none of the record was printed for use in the Court of Appeals.

A timely petition for rehearing was filed February 15, 1965, (C.A.R. 43-56) and denied February 25, 1965. (C.A.R. 57.) On March 25, 1965, this Court (per Mr. Justice Byron R. White) extended to April 26, 1965 the time within which to file a petition for certiorari. (Appendix E., App. 88.) The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) and Rule 22(2) of the Rules of this Court.

QUESTIONS PRESENTED.

1. Did the Court of Appeals deprive defendants of their constitutionally protected privilege against self-incrimination and otherwise transgress the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure when, in affirming the denial by the District Court of defendants' motion for acquittal made at the close of the government's case in chief, it considered and applied as justification for the denial of said motion, testimony of defendants introduced by them following denial of their motion for acquittal, as well as evidence introduced by the government in its rebuttal?

2. In ruling that petitioners' motion for acquittal at the close of the government's case in chief was properly denied, did the Court of Appeals construe and apply the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure differently from the construction and application given Rule 29(a) by the Court of Appeals for the District of Columbia in *Cephus* v. *United States*, 324 F.2d 893 (D.C. Cir. 1963) and *Franklin* v. *United States*, 330 F.2d 205 (D.C. Cir. 1964), so as to present a conflict in construction and application of the Rule between the circuits on an important question of federal criminal procedure?

3. Were petitioners' rights under the Due Process of Law, Confrontation and Fair Trial By Impartial Jury Clauses of the Fifth and Sixth Amendments to the Constitution of the United States violated by virtue of persistence by the District Attorney throughout the trial in:

   a. Asking some 298 argumentative and insinuating questions to all of which objections were sustained, 90 of which were asked after he had been directed by the Court to desist therefrom;

b. Asking insinuating questions of defendants on cross-examination, all of which elicited expected denials, and as to which he offered no evidence, which questions were framed so as to imply and insinuate in detail (and as to one of which the District Attorney represented to the Court in the presence of the jury he had proof) that certain conspiratorial meetings had been held, that petitioner A. L. Koolish, co-defendant Marvin L. Kline, as well as Fred Fadell, the co-defendant who entered a midtrial plea of guilty, had attended those meetings, that in the course thereof they made corrupting agreements for payment by petitioners to Fadell of alleged secret "kickbacks" which were in turn to be, and were, "split" by him with Kline in return for which Fadell and Kline agreed to forsake their duties and obligations to the Kenny Foundation to the monetary advantage of petitioners and their companies;

c. Employing in connection with and as a backdrop for the foregoing, various devices and means in the presence of the jury, (including the seating of Fadell in the spectators benches in the courtroom during the cross-examination of petitioner A. L. Koolish) designed to suggest to the jury that the District Attorney possessed wax disc recordings of telephone conversations between Fadell and petitioner A. L. Koolish with respect to said conspiratorial meetings and agreements, as well as a typewritten transcript of one of said telephone conversations; and then failing to call Fadell as a witness or to qualify and tender the supposed typewritten transcript in evidence to substan-

tiate these insinuations despite his representations to the Court at the time Fadell was permitted to change his plea, and later, that he would call Fadell as a Government witness and his further express representation to the Court that he had proof of his insinuations;

d. Asking insinuating questions affirmatively suggesting that co-defendant Kline had failed to report and pay income taxes on the share of the alleged "kickbacks" he had received from Fadell;

e. Asking insinuating questions suggesting that one of petitioners' managing employees, whom the District Attorney subpoenaed and interrogated but failed to call as a witness, had informed petitioners by oral communication to petitioner David Koolish, that in each of the fall "cold shot" mass mailings after 1955, 1,500,000 Kenny Foundation contributor names had been surreptitiously employed by petitioners without the authority or knowledge of the Foundation and for which the Foundation was improperly charged; and

f. Asking questions of various witnesses insinuating a variety of misconduct on the part of petitioners and their co-defendants, which questions elicited expected denials, but as to which the District Attorney offered no proof.

4. Did the acceptance of Fadell's midtrial change of plea, the District Court's informing the jury thereof, the District Attorney's seating (unknown to petitioner's counsel) of Fadell in the spectators' benches in the courtroom during cross-examination of petitioner A. L. Koolish, the District Attorney's asking questions of Messrs. P. H., David and A. L. Koolish, suggesting that meetings with respect to

payment of kickbacks had been attended by A. L. Koolish, Fadell and Kline, and the District Attorney's tactics in the presence of the jury which served to imply possession on his part of wax disc recordings (and a typewritten transcript) of telephone conversations between A. L. Koolish and Fadell with respect to said alleged agreement to pay "kickbacks", serve to violate petitioners' rights under the Confrontation, Due Process and Jury Trial clauses of the Fifth and Sixth Amendments?

5. Under the circumstances of this case, were petitioners said rights of Confrontation, Due Process, and Fair Trial by Impartial Jury violated when the District Court (a) permitted co-defendant Fadell, after three weeks of trial, to withdraw his plea of not guilty to all sixteen counts of the indictment and plead guilty to but one of those counts upon agreement that the remaining fifteen counts (including the conspiracy count) would be dismissed; and (b) advised the jury thereof (saving, however, the agreement to dismiss the other counts of the indictment) but strongly cautioned the jury that they were not to consider the guilty plea as evidence against petitioners?

6. Did the massive, provocative and prejudicial pretrial newspaper, radio and television publicity that was persistently and repeatedly disseminated throughout the District of Minnesota during a period of three years preceding the trial (some of which was released by the District Attorney virtually on the eve of trial) so prejudice or otherwise affect and condition the inhabitants as to make it unlikely that petitioners could or did obtain twelve fair and impartial jurors?

7. Did the *voir dire* examination of the prospective jurors conducted exclusively by the learned trial judge serve reasonably to exclude from the trial jury all prospective jurors

who had or might have been adversely affected or conditioned by the massive, persistent pretrial publicity and also afford counsel for petitioners sufficient information respecting prospective jurors so as to enable them intelligently to exercise petitioners' peremptory challenges?

8. Viewed in the light of all of the circumstances of this case was the District Attorney's rebuttal argument so inflammatory, and otherwise prejudicial and improper, as to lead reasonably to the conclusion that the jury in reaching its verdict considered and gave weight to alleged facts as to which there was no competent evidence in the record and so as to inflame the jury against petitioners?

9. Did the Court of Appeals in effect put petitioners to trial in that Court and thus deprive them of their right to trial by jury guaranteed them by the Sixth Amendment when it held that the cautionary instructions given to the jury by the learned District Judge respecting the conduct of the District Attorney during the trial served to remove the prejudicial effect thereof upon the jury and, therefore, the jury must have based its verdict solely upon the competent evidence in the record, uninfluenced by passion, prejudice, incompetent evidence or alleged facts volunteered by the District Attorney?

CONSTITUTIONAL PROVISIONS, STATUTES OR RULES INVOLVED.

This case involves the Fifth and Sixth Amendments to the Constitution of the United States and Rules 21(a) and 29(a) of the Federal Rules of Criminal Procedure, 18 U.S.C., Rules 21 and 29, the full texts of which are set out in Appendix F. (App. 88 to 89.)

STATEMENT OF THE CASE.

Petitioners Abraham L. Koolish and David F. Koolish, father and son of Chicago, Illinois, were the owners and operators of several businesses which conducted direct mail solicitations for contributions for the Sister Elizabeth Kenny Foundation, Inc. (hereinafter "Kenny"), a Minnesota charitable corporation which had its national headquarters in Minneapolis and operated polio hospitals and clinics in that city and elsewhere. Petitioner John B. Carnell of Chicago was an employee of the Koolishes, who serviced the Kenny account. Petitioners were indicted with the following persons: Marvin L. Kline, a former alderman and mayor of Minneapolis and the Executive Director of Kenny; Fred Fadell of Minneapolis, the owner and operator of Fred Fadell and Associates, an independent public relations and advertising agency, retained by Kenny; J. George Zimmerman, a Minneapolis certified public accountant, who was engaged by Kenny to perform independent audits of its books and render financial statements; and Philip G. Rettig of Chicago, who was for a time president of New Century Corporation, which was owned by petitioners Abraham L. and David F. Koolish. (R. 1-2.)

The indictment consisted of sixteen counts the first fifteen of which charged all defendants with having devised and having intended to devise a scheme and artifice to defraud and to obtain money and property from Kenny, its contributors and prospective contributors by means of false and fraudulent pretenses, representations and promises, and use of the mails in furtherance thereof, in violation of Section 1341 of Title 18, United States Code (18 U.S.C. § 1341). (R. 1-17.) The sixteenth count charged a conspiracy participated in by all defendants to commit mail fraud in violation of Section 371, Title 18, United States Code (18 U.S.C. § 371). (R. 17-20.)

The scheme to defraud alleged in the indictment was in substance that by bribery of Kenny Foundation personnel, particularly co-defendants Kline and Fadell, and by other devious and fraudulent means, petitioners would and did gain and hold possession of and secretly employ the Kenny Foundation's list of contributors to petitioners' financial advantage, conceal from the Kenny Foundation Directors and contributors the true costs of the mail solicitation campaign services conducted by petitioners and their companies, the use by them of corporate fronts or shells to prevent the Kenny Directors and contributors from learning the true identities of petitioners as the actual operators of the campaigns, and the realization by them of excessive profits as a result of all of the foregoing.

Prior to the trial petitioners moved (1) for a severance from the Minneapolis defendants and (2) to transfer the case from the District of Minnesota on the ground that massive, provocative and adverse pre-trial publicity persistently disseminated in the District of Minnesota through newspapers circulated in the District, as well as through radio and television broadcasts, for approximately two years preceding the filing of the motion had so prejudiced and otherwise conditioned the community and its citizens that petitioners could not obtain a fair trial in the District. (R. 72-73; 117-124.) The events which gave rise to that persistent publicity are set out chronologically below.*

March through June 1960 — Various news stories and broadcasts respecting the Minnesota Attorney General's (Miles W. Lord, Esq. until mid-May and Walter F. Mondale, Esq. thereafter) investigation of Kenny Foundation affairs, with particular reference to participation therein of Kline, Fadell, Zimmerman and these petitioners. (R. 125-131.)

June 27, 1960 — Same with respect to the Minnesota Attorney General's Report of the investigation. (R. 132-135.)

The motions for severance and to transfer were denied. (R. 107; 300-304.)

The trial before the learned District Judge and a jury began March 19, 1963 and concluded over ten weeks later on May 29, 1963. At the outset petitioners' challenge to the array of jurors and the renewal of their motion to transfer based upon prejudicial publicity were denied. (T. 6.)

Pursuant to the practice obtaining in the Minnesota District the trial judge conducted the entire *voir dire* examination of the prospective jurors. Also pursuant to that practice and in advance of the opening of the trial, petitioners submitted a list of 79 questions which they requested be put to the prospective jurors by the court. (T. 12; S.R. 1-5.) Many of these questions were ignored

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(Footnote continued)

April 1960 through March 1961 — Various articles, news stories and broadcasts with respect to the reorganization of Kenny Foundation to meet sweeping charges and recommendations made in Attorney General's Report. (R. 136-155.)

July 1960 — Stories, reports and broadcasts as to the convening and thereafter the proceedings before the Hennepin County (Minneapolis area) grand jury investigation of Kenny Foundation affairs. (R. 156-158.)

July 29, 1960 — Publicity respecting Hennepin County grand jury report upon its investigation of Kenny Foundation affairs. (R. 159-164.)

July 29, 1960 — Publicity respecting Hennepin County grand jury indictment of co-defendant Marvin L. Kline for grand theft from Kenny Foundation. (R. 165-168.)

August through October 1960 — Publicity through all media respecting institution of proceedings against co-defendant J. George Zimmerman to effect revocation of his license as a Certified Public Accountant and the proceedings in respect thereto before the State Accountancy Board all upon petition of Minnesota Attorney General (R. 235-246.)

by the trial judge despite renewed requests during the course of the *voir dire* examination that they be asked. Petitioners objected to the *voir dire* examination on the ground that it afforded them so little information concerning the prospective jurors that they were unable intelligently to exercise their peremptory challenges. (T. 45; 125-128.) Many of the questions submitted by petitioners but which the District Judge declined to put to prospective jurors were designed to test the impact of pre-trial publicity on those jurors. (T. 127; S.R. 3.)

The *voir dire* examination of 48 regular and alternate jurors was completed in less than one day. (T. 23-157; 165.)

After three weeks of trial, defendant Fred Fadell announced that he wished to change his plea from not guilty to guilty. (T. 3068.) Up until that time Fadell and his counsel had been active participants in the defense of the

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(Footnote continued)

October 1960 — Publicity through all media respecting commencement of Federal Grand Jury investigation into the affairs of the Kenny Foundation and the participation therein of co-defendants Kline, Fadell, Zimmerman and these petitioners. (R. 257-259.)

November 1960 and following months into mid-1961 — Publicity in all media respecting civil suit commenced by the Minnesota Attorney General in Hennepin County District Court against Chicago defendants, and various proceedings thereafter had in that Court, the United States District Court in Minneapolis, and the United States District Court in Chicago. Suit filed day or two prior to General Election, at which Minnesota Attorney General was candidate for reelection. The action was removed to the United States District Court. Motion for remand was heard and denied after hearings. Cause was transferred to United States District Court in Chicago and thereafter dismissed and new suit by Sister Elizabeth Kenny Foundation was then filed in the United States District Court in Chicago. (R. 249-256.)

case. Counsel for petitioners strenously objected to the allowance of the change of plea at that late date. In the alternative, it was urged that should Fadell be granted leave to change his plea, the remaining defendants should be granted a severance, a mistrial, a change of venue and a continuance. (T. 3116-3121, 3131.) They also requested that in the event the change of plea was accepted, the jurors not be told of it. (T. 3131.)

The government urged that the jurors be advised of the change of plea. The United States Attorney expressly represented that Fadell would testify for the government and the jurors would then learn of his plea. (T. 3141, 4036.)

The court overruled all of defendants' objections and suggestions and granted leave to Fadell to plead guilty to Count VI. (T. 3223-3233.) In exchange for Fadell's guilty

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(Footnote continued)

January through February 1961 — Publicity through all media respecting trial (verbatim portions of which were printed in newspapers and quoted in broadcasts) of Grand Theft indictment of co-defendant Marvin L. Kline by Hennepin County Grand Jury. (R. 177-226.)

March through April 1961 — Publicity through all media respecting motions for new trial in Kline criminal case, the sentence of Kline, and commencement of his appeal. (R. 227-232.)

January through April 1961 — Publicity respecting introduction in, sponsorship by Minnesota Attorney General, and ultimate passage of charities' solicitation legislation by Minnesota legislature, with attendant references to Kenny Foundation affairs. (R. 293-298.)

August 1961 through January 1962 — Publicity through all media of convening by Miles W. Lord, former Minnesota Attorney General who had in the meantime been appointed United States Attorney, of Federal Grand Jury to conduct new investigation into the affairs of the Kenny Foundation and the participation therein of Kline, Fadell, Zimmerman and these petitioners. (R. 260-274.)

plea the government agreed that the remaining 15 counts (which included the conspiracy count) of the indictment would be dismissed at the time of sentencing. (T. 3238-3239.)* The jurors were immediately informed of Fadell's change of plea (but not of the agreement of the United States Attorney to dismiss all counts other than Count VI) and they were admonished not to consider the plea of guilty to Count VI as evidence that a crime had been committed or that any of the other defendants were guilty as charged. (T. 3240-3241.)

Petitioners through their counsel sought to memorialize all of the facts and circumstances leading up to and concerning Fadell's change of plea. To this end a motion was made that petitioners' counsel be permitted to examine Fadell, the United States Attorney, the first assistant United States Attorney and the postal inspectors who aided the prosecution. This motion was denied. (T. 8288, 8297.)

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*Accordingly, those counts were dismissed on September 13, 1963. (T. 35.)

(Footnote continued)

January 30, 1962 — Publicity through all media respecting the return of the indictment in this cause by the Federal Grand Jury. (R. 275-277.)

February 1962 — Publicity through all media respecting the arraignment of these petitioners and their co-defendants in that cause. (R. 278-283; 985.)

April 1962 — Publicity through all media respecting motions of defendants for severance, transfer and quashing of indictment. (R. 721-722; 745-749; 814-815; 838-840; 918-919.)

May through June 1962 — Publicity respecting hearings upon and the ultimate denial of defendants' aforesaid motions. (R. 750; 841-845; 851-852; 865-873; 921-922; 962; 970; 986.)

Defendants moved for judgment of acquittal and dismissal of the indictment at the close of the government's case in chief, and again at the close of all the evidence. (R. 661-662; T. 8283-8287.) The motions were denied. (T. 5060; R. 1697.)

Prior to submission of the case to the jury the government withdrew Counts VI, VII, VIII and X and Overt Acts 1, 3, 4 and 14 from consideration by the jury. (T. 4998, 8254, 8319.)

The jury found all of the defendants guilty of the conspiracy charged in Count XVI. Petitioners Abraham L. Koolish and David F. Koolish were found not guilty on

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(Footnote continued)

August 1962 — Publicity through news and broadcasting media respecting hearings upon and proceedings with respect to setting of cause for trial. (R. 816; 853-854; 874; 944-945; 987.)

October through November 1962 — Publicity in news and broadcasting media throughout 1962 General Election Campaign in Minnesota, including full page advertisements, speeches and broadcasts by Attorney General Walter F. Mondale, who was a candidate for reelection in that campaign, praising Mr. Mondale's conducting of Kenny Foundation investigation, his successful sponsorship in Minnesota legislature of charitable solicitation legislation, his prosecution of and conviction of Marvin L. Kline for Grand Theft, and his successful maintenance of his petition for revocation of Zimmerman's CPA license. This publicity included full page advertisements in the four metropolitan dailies in the St. Paul - Minneapolis area, political speeches by Mr. Mondale, and at least seven television and thirty-eight radio spot announcements. (R. 965; 972-977; 988-993; 1002-1015; 1027; 1029-1032.)

November 1962 — Publicity respecting resetting of this cause for trial. (R. 946; 1016.)

December 1962 — Publicity respecting further resetting of cause for trial. (R. 817-818; 855; 875-876; 923-924; 947; 978; 1017.)

seven counts of mail fraud, having been found not guilty on Counts III, V, XI & XII. Petitioner John B. Carnell was found guilty on eight counts of mail fraud, having been found not guilty on Counts III, V and XI. Defendant Kline was found guilty on nine counts of mail fraud, having been found not guilty on Counts V and XI. Defendant Zimmerman was found guilty of mail fraud only as charged in Count IX. (R. 1066-1070.)

Petitioners' motion for new trial, together with all of the motions which were taken under advisement at the close of all the evidence, were denied by the learned District Judge by written opinion, (App. C. pp. 47-86) which is reported in 221 F. Supp. 776. (R. 1576-1593, 1665-1697.)

(Footnote continued)

December 25, 1962 — Eve of trial feature article and story in Minneapolis Star about use of mail fraud statute by Federal authorities as device to "trip U. S. racketeers" in which United States Attorney Miles W. Lord, Esq. was quoted as characterizing "the alleged $10 million bilking of Kenny funds as among the 'greatest frauds in American history'." (R. 948.)

January 1963 — Publicity respecting resetting of cause for trial on March 19, 1963. (R. 950; 1018.)

March 18, 1963 — Publicity in Minneapolis-St. Paul dailies and on radio and television respecting trial to commence on following day. (R. 846; 994.)

The foregoing items of pre-trial publicity are set forth in detail in the exhibits to Defendants' pre-trial motion to transfer cause on the ground of prejudice of the inhabitants of the Minnesota District because of massive repeated prejudicial publicity and like subsequent updating motions and affidavits.

The various newspaper stories repeated and rehashed the Kenny Foundation event regardless of the nature of the occurrence (i.e., setting of trial dates, rulings on motions, etc.) that stimulated the news report.

Petitioners Abraham L. Koolish, then 71 years of age, (T. 8023) and his son, David F. Koolish, then 43 years of age, (T. 6380) were each sentenced to two consecutive five-year terms of imprisonment, fined $17,000 and ordered to pay $7,479.76 costs of prosecution. (R. 1707, 1708, 1743, 1776.)

Petitioner John B. Carnell, then 59 years of age, (T. 6891,) was sentenced to a term of five years in prison. (R. 1709.) Defendant Kline was sentenced to two consecutive five-year prison terms. (R. 1705.) Defendant Zimmerman's five-year term of imprisonment was suspended and he was placed on probation for the period of time. (R. 1710.)

Defendant Fadell, on his guilty plea to Count VI, was sentenced to but one year and one day imprisonment. At his request his sentence was stayed 30 days. (R. 1706.) During this stay he moved for a further stay of two years or in the alternative for a suspended sentence and probation. (S. R. 9-14.) The government did not oppose Fadell's motion and disposition of it was continued for a period of 18 months from October 14, 1963. (S. R. 7.)

REASONS FOR GRANTING THE WRIT

I.

THIS CASE PRESENTS AN IMPORTANT QUESTION RESPECTING THE INTERPRETATION AND APPLICATION OF RULE 29(A) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

A.

WHAT IS THE SCOPE OF THE EVIDENCE WHICH A COURT OF APPEALS MAY CONSIDER IN DETERMINING WHETHER A TRIAL COURT PROPERLY DENIED A MOTION FOR ACQUITTAL MADE AT THE CLOSE OF THE GOVERNMENT'S CASE IN CHIEF UNDER RULE 29 (a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE?

At the close of the government's case in chief petitioners moved under Rule 29(a) of the Federal Rules of Criminal Procedure for judgments of acquittal on the premise that the government had failed to sustain its burden of proving a prima facie case. The motion was denied. The defense thereupon put in its case and the government offered its rebuttal evidence. Petitioners again moved for acquittal at the close of all the evidence. The motion was taken under advisement pending the jury verdict and subsequently denied.

Petitioners contended on appeal below (C.A.R. 44) that in reviewing the denial of the motion for acquittal made at the close of the government's case in chief, the Court of Appeals was required by the provisions of Rule 29(a) of the Federal Rules of Criminal Procedure (App. F., p. 89) to restrict itself to a consideration of the evidence that was in the record at the time the motion was made, and that it could not consider or give any weight or consideration to evidence subsequently introduced by the defendants dur-

ing their case (in particular their testimony) or by the government in rebuttal; and that for the District Court or the Court of Appeals to consider and give weight to defendants' evidence would be to violate defendants' rights under the self-incrimination clause of the Fifth Amendment.

However, it would appear that the Court of Appeals did not apply the rule, for in reciting that the government made out a *prima facie* case sufficient to withstand defendants' motion to acquit the Court states (App. A, pp. 11-12):

> "Among other things, however, the jury could, and undoubtedly did, find the following:
>
> 1. Unbeknownst to the directors of the Kenny Foundation, the Koolishes through Empire Industries, Inc., Empire Associates and New Century paid $359,200 to Fred Fadell and Associates during the period from February 28, 1952, through May 31, 1960. Fred Fadell, in turn, paid Marvin Kline $113,750 from December 1952 through May 1957. The inference that the other defendants knew of the division with Kline *was justified through Carnell's testimony that he learned that Fadell and Associates was retaining Kline as a 'consultant' and that he had so advised Phil Koolish.* The close association and cooperation between the various parties supports the conclusion of complete awareness of this pay-off." (Emphasis ours.)

and at App. A., p. 16:

> "20. The 1959 fall mailing of 12,000,000 pieces could have been performed by a Minneapolis letter shop at a savings of $27.94 per thousand less than the $67.50 per thousand charged by New Century Corporation, or a total saving to the Foundation of approximately $335,304."

Carnell's testimony was adduced on defendants' proofs. The evidence respecting the Minneapolis letter shop was adduced by the government on its rebuttal.

The heart of the scheme charged in the indictment was that petitioners through their companies paid money to defendant Fadell, Kenny's public relations director, and that Fadell in turn split a portion of this money with defendant Kline, Kenny's executive director. The government alleged that the purpose of the payments was to enable petitioners to charge excessive prices for their services and thereby reap large profits.

Petitioners contended that they retained Fadell's public relations agency in good faith to render national public relations services to promote Kenny, a relatively unknown charity that had to compete with the National Foundation for Infantile Paralysis (March of Dimes) for charitable contributions and in doing so advance a new and controversial method of treatment of polio. The government during its case in chief attempted but failed to prove knowledge on the part of petitioners that Fadell was making payment to Kline out of the payments for national public relations services petitioners made to Fadell and Associates. On appeal, petitioners contended that lack of proof of this knowledge on the part of petitioners was fatal to the government's case in chief. Accordingly, the reliance by the Court of Appeals on Carnell's testimony which was not adduced on the government's case in chief was at odds with Rule 29(a) and constituted a violation of defendants' rights under the self-incrimination clause of the Fifth Amendment. *Cephus* v. *United States,* 324 F.2d 893 (D.C. Cir. 1963); *Franklin* v. *United States,* 330 F.2d 205, 208 (D.C. Cir., 1964.)

Petitioners also contended the government during its case in chief had failed to prove that the prices which they had charged Kenny were in excess of what any other mailers would have charged for similar materials and services.

In his rebuttal argument to the jury (App. 95) the United States Attorney asserted that this was the most important element in the government's case against petitioners. The Minneapolis letter shop proof, quoted above, relied upon by the Court of Appeals was introduced not on the government's case in chief but on rebuttal over defendants' vigorous objection (G. Ex. 656; T. 8229.) Accordingly, it could not advance the government's case in chief and the Court of Appeals erred in considering it.

B.

THERE APPEARS TO BE A CONFLICT IN PRINCIPLE BETWEEN THE CIRCUITS ON THE CONSTRUCTION AND APPLICATION OF RULE 29(a) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE.

As heretofore demonstrated, the Court of Appeals for the Eighth Circuit considered evidence received after the government had completed its case in chief in ruling on the propriety of the denial of defendants' motion for acquittal made at the close of the government's case. However, the Court of Appeals for the District of Columbia in *Cephus* v. *United States*, 324 F.2d 893 (D.C. Cir. 1963) and *Franklin* v. *United States*, 330 F.2d 205, 208 (D. C. Cir. 1964) has held that Rule 29(a) of the Federal Rules of Criminal Procedure requires that on review of an order denying a motion for acquittal a Court of Appeals must limit itself to a consideration of the evidence in the record at the time the motion for acquittal is made.

This Court ought to resolve this important issue as to the correct construction and application of Rule 29(a) of the Federal Rules of Criminal Procedure.

II.

UNDER ALL OF THE CIRCUMSTANCES OF THIS CASE PETITIONERS' RIGHTS UNDER THE CONFRONTATION, DUE PROCESS OF LAW AND FAIR TRIAL BY IMPARTIAL JURY CLAUSES OF THE FIFTH AND SIXTH AMENDMENTS WERE VIOLATED BY THE DISTRICT ATTORNEY'S PERSISTENT USE THROUGHOUT THE TRIAL OF INSINUATING QUESTIONS ON DIRECT AND CROSS-EXAMINATION THROUGH WHICH HE ASSERTED THE EXISTENCE OF PROOF OF GRIEVOUS MISCONDUCT ON THE PART OF PETITIONERS AND THEIR CO-DEFENDANTS, HIS RESORT TO VARIOUS ARTIFICES IN THE COURTROOM IN THE PRESENCE OF THE JURY THROUGH WHICH HE BROUGHT THE IMAGE OF FADELL AND HIS MID-TRIAL CHANGE OF PLEA BEFORE THE JURY AS EVIDENCE AGAINST PETITIONERS WITHOUT CALLING OR INTENDING TO CALL FADELL AS A WITNESS, AND HIS INFLAMMATORY, MISLEADING AND IMPROPER REBUTTAL ARGUMENT TO THE JURY.

THE LEARNED DISTRICT JUDGE UNWITTINGLY AFFORDED MEANS IN THIS REGARD TO THE DISTRICT ATTORNEY BY ACCEPTING FADELL'S MID-TRIAL CHANGE OF PLEA AND INFORMING THE JURY THEREOF ON THE REPRESENTATION OF THE DISTRICT ATTORNEY THAT HE INTENDED TO CALL FADELL AS A WITNESS.

A.

The Court of Appeals characterized the conduct of the United States Attorney as "over zealousness." (App. 37.) The learned District Judge sought by strong instructions

to the jury to accomplish the impossible feat of inducing the jury to erase from their minds the improper conduct of and suggestions of facts made to them by the District Attorney.*

Petitioners contend that a consideration of the entire record cannot lead to any conclusion but that this "overzealousness" and improper conduct violated petitioners' rights to a fair trial before an impartial jury, to confrontation and cross-examination of their accusers, and due process of law guaranteed them by the Fifth and Sixth Amendments.

1.

FAILURE TO PROVE INCRIMINATING FACTS SUGGESTED IN PROSECUTOR'S QUESTIONS.

Many times during the trial various witnesses, particularly petitioners or their employees, were asked questions by the United States Attorney through which he insinuated in striking detail that certain conspiratorial meetings had been held, that prejudicial and incriminating admissions had been made by various defendants, Fadell

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*As to the ineffectiveness of such instructions, see *Tucker* v. *Henniker*, 41 N.H. 317, 324-326 (1860); *People* v. *Ah Len*, 92 Cal. 282, 28 Pac. 286, 287 (1891); *Dunn* v. *United States*, 307 F.2d 883, 886 (5th Cir. 1962); *Krulewitch* v. *United States*, 336 U.S. 440, 453 (1949) (Jackson, J., concurring); *United States* v. *Antonelli Fireworks Co.*, 155 F.2d 631, 656 (2d Cir. 1946) (Frank, J., dissenting); *United States* v. *Grayson*, 166 F.2d 863, 871 (2d Cir. 1948) (Frank, J., concurring); *People* v. *McElvey*, 260 Pac. 397 (Cal. 1927); *Patterson* v. *State*, 126 So. 420, 422 (Ala. 1930); *People* v. *Anthony*, 196 Pac. 47, 49-50 (Cal. 1921); *DeLuna* v. *United States*, 308 F.2d 140, 154 (5th Cir. 1962); *United States* v. *De Dominicus*, 332 F.2d 207, 210 (2d Cir. 1964); *Walbert* v. *Farina*, 192 A.2d 404, 409 (Pa. 1963).

and Kline in particular, or conversations had been had by or with them or in their presence, and that incriminating acts had been committed.

In each instance the witness denied the accusation and insinuation. The United States Attorney did not thereafter offer any testimony or evidence to prove any of the alleged facts so carefully and prejudicially staged and insinuated. The prejudicial effect upon a lay jury of this type of improper conduct has been universally recognized by all courts.

Space does not permit setting out in this petition all of the instances in the record where this type of activity occurred. Suffice it to say that it occurred so often and the facts so carefully suggested were considered by petitioners' counsel to be of such a prejudicial and incriminating nature that they felt constrained to request a mistrial (Tr. 8264-8272) and the learned District Judge sought by extended instructions to the jury to induce the members to erase the prejudicial events from their minds.

It is not too difficult upon consideration of the entire record to perceive that the supposed primary source of the purported incriminating facts and circumstances which the prosecutor so carefully staged was defendant Fred Fadell. Yet the prosecutor declined to call Fadell as a witness, much preferring to elicit Fadell's "testimony" through himself by using the device of asking questions containing unproved incriminating details and which he knew would elicit denials.*

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* Even the learned and experienced District Judge despite his disciplined mind was led by the trial tactics of the District Attorney to believe that he could prove the insinuations inherent in the District Attorney's questions. As late as three months after the trial had ended, and in his written opinion in support of his ruling on

It was the insinuating questions, not the expected negative responses thereto, which were important to the prosecutor. This tactic served only to deny petitioners a fair trial. *People* v. *Wells*, 100 Cal. 459, 462, 34 Pac. 1078, 1079-80 (1898)); *State* v. *Flowers*, 114 N.W.2d 78, 81 (Minn. 1962); *State* v. *Silvers*, 40 N.W.2d 630, 635 (Minn. 1950.)

(Footnote continued)
petitioners' motion for new trial he stated his belief that the District Attorney, although he failed to do so on the trial, could have proved the alleged facts improperly suggested by his questions (App. C., p. 74):

> "This fact is recited in order to suggest that it is not unlikely that if the prosecutor were afforded the opportunity, he could have proved some or maybe many of the inferences contained in the questions asked on direct and cross-examination to which defendants' counsel make objection.
>
> "Fred Fadell did not testify. The decision of the United States Attorney not to call him—although he several times stated his intention to do so—may have been based on the many vigorous anticipatory objections by defense counsel to the calling of Fadell. But, had Fadell been called, it is not improbable that his testimony would have proved many of the inferences to which objection is made."

We hardly need suggest that the lay jurors must have been of like view during the course of their deliberations that followed immediately the close of the evidence (*viz.*, that the District Attorney's unproven suggestions to the jury could have been proven by him.)

This is the very evil erosion, tarnishing and weakening of fair trial, due process of law, trial by jury, and right to confront and cross-examine witnesses that the courts of this nation have uniformly decried. *People* v. *Ah Len*, 92 Cal. 282, 28 Pac. 286, 287 (1891); *Douglas* v. *Alabama*, 33 Law Week 4304 (April 6, 1965); *Tucker* v. *Henniker*, 41 N.H. 317, 324-326 (1860); *United States* v. *Grayson*, 166 F.2d 863, 871 (2d Cir. 1948) (concurring opinion of Judge Frank); *People* v. *Anthony*, 196 Pac. 47, 49-50 (Cal. 1921); *State* v. *Nelson*, 181 N.W. 850, 857 (Minn. 1921).

As late as April 5, 1965, this Court held that like tactics on the part of a prosecutor served to violate rights of Confrontation guaranteed all defendants by the Sixth Amendment. *Douglas* v. *Alabama,* 33 Law Week 4304 (April 6, 1965.) That such conduct also violated petitioners' rights of due process of law and fair trial is equally obvious.

2.

THE DISTRICT ATTORNEY'S INFLAMMATORY AND PREJUDICIAL REBUTTAL ARGUMENT DEPRIVED PETITIONERS OF A FAIR TRIAL BEFORE AN OPEN MINDED IMPARTIAL JURY.

The rebuttal argument of the United States Attorney was contrived and designed to stampede the jury into returning guilty verdicts based on passion and prejudice and on the District Attorney's insinuating suggestions of facts rather than competent evidence adduced in open court. His rebuttal argument was not spontaneous; it was planned. It was the culmination of all of the unfair conduct on the part of the prosecutors that permeated the whole trial.

As an aid to this Court, petitioners have printed the entire rebuttal argument as Appendix G to this Petition. (App. 90 to 105.) Some examples of the United States Attorney's improper rebuttal argument are the following:

(1) By telling the jury that they could rely upon the representations made by him in his questions, App. G. p. 91, "We sometimes have even identified—counsel have accused us of leading questions, but I think it's made for a better understanding of the case."

(2) By improperly testifying to his inflammatory and highly prejudicial conception of what petitioner A. L.

Koolish "saw" in his early visit to the Kenny Foundation in Minneapolis. App. G. pp. 91-92.

(3) By making reference to Mrs. Duerr an employee of petitioners whom he failed to call as a witness but had named in an insinuating question as having advised petitioner David Koolish that Kenny Foundation contributor list names were being surreptitiously used by petitioners. App. G. p. 92.

(4) By dwelling upon the wealth of petitioners. App. G. p. 102.

(5) By referring to other charities for which petitioners had mailed, particularly those which minister to persons with unfortunate physical afflictions, such as "the blind, the poor, the war orphans, the brain injured." (App. G, p. 96.) Evidence concerning charities was admitted over objections solely for the purpose of purportedly showing intent. Mention of these charities was the same type of argument denounced in *Greenberg* v. *United States,* 280 F.2d 472, 474 (1st Cir. 1960).

(6) Associating himself with the jury because both were under oath. (App. G. p. 104.) *Steele* v. *United States,* 222 F.2d 628, 631 (5th Cir. 1955.)

(7) Mentioning the irrelevant and unproven facts respecting the time and expense to the government supposedly necessitated by Petitioners' wrongdoings. (App. G. p. 104.) *Windisch* v. *United States,* 295 F.2d 531, 533-534 (5th Cir. 1961); *People* v. *Talle,* 111 Cal. App. 2d 650, 245 P. 2d 633, 647 (1952).

3.

OTHER PREJUDICIAL PROSECUTOR MISCONDUCT.

In addition to the foregoing indiscretions, the United States Attorney made improper statements in the presence of the jury; he asked at least 298 argumentative questions to which objections were sustained, 90 of which occurred after he was admonished by the learned trial judge to desist from so doing; he improperly made references to several witnesses' grand jury testimony (T. 2314, 2321, 2804, 2853, 3456-3458, 3471); and unknown to petitioners he twice procured defendant Fadell to be present in the spectator section of the courtroom in full view of the jury after Fadell had changed his plea to guilty and during the District Attorney's examination of witnesses in respect of supposed nefarious meetings between petitioners and Fadell (T. 8064.)

Petitioners contend that when the totality of the conduct the United States Attorney throughout the trial of this cause is considered, it is manifest that petitioners were deprived of a fair trial. This is a case in which "the United States prosecuting attorney overstepped the bounds of that propriety and fairness which should characterize the conduct of such an officer in the prosecution of a criminal offense . . ." *Berger* v. *United States*, 295 U. S. 78, 84 (1935).

III.

THIS CASE PRESENTS OTHER IMPORTANT QUESTIONS OF FEDERAL CONSTITUTIONAL LAW.

A. THE MASSIVE PREJUDICIAL PRETRIAL PUBLICITY.

There is presented the question whether petitioners were denied a fair trial by (1) subjecting them to trial, over their objection, in a community which for nearly three years had been saturated with adverse, prejudicial newspaper, radio and television publicity about them and their co-defendants respecting the affairs of the Kenny Foundation and the petitioners' allegedly nefarious participation therein, and (2) by allowing one of their co-defendants to plead guilty after three weeks of court room participation on his part and his counsel in the trial and, over their objection, telling the jury of that change of plea.

The refusal of the trial court to grant petitioners' motion to transfer this cause for trial to a forum other than Minnesota ignored this Court's holding in *Rideau* v. *Louisiana*, 373 U. S. 723 (1963), that where an entire community has been exposed to persistent, pervasive, provocative, adverse publicity, prejudice will be conclusively presumed and due process of law requires a trial before a jury drawn from a community of people who had not been exposed to such publicity.

At the time the trial court denied petitioners' motion to transfer he did so on the ground that the motion was premature and that the proper time for determining whether an impartial jury could be secured in the District of Minnesota was the *voir dire* examination. (App. 46.) However, the *voir dire* examination all of which was conducted by the learned trial judge was insufficient to elicit the information needed to make that determination. His

refusal to ask the prospective jurors the questions submitted by petitioners' counsel in advance of trial concerning the adverse pretrial publicity and the jurors' exposure thereto, although twice expressly requested to do so, denied to petitioners the right intelligently to exercise their peremptory challenges, which right this Court stated was so important in *Pointer* v. *United States,* 151 U.S. 396, 408-409 (1894).

The United States Attorney was himself the source of some of the prejudicial information which was disseminated by the news media. On December 2 5, 1962, at which time this cause was set for trial on January 9, 1963, (which was less than three months prior to the actual commencement of the trial) there appeared in The Minneapolis Star, the Twin Cities' most widely circulated metropolitan daily, a feature story about how the mail fraud statute rather than the income tax statute had gradually come into use by the government to convict "racketeers". (R. 948.) The story, which prominently mentioned Al Capone and other nefarious characters, stated in part:*

> "Miles W. Lord, United States district attorney, said the shift of emphasis from use of the tax statute to the mail fraud statute in prosecuting racketeers has been gradual, but effective.
>
> It is the mail fraud statute under which Marvin L. Kline, one time mayor of Minneapolis and long time executive director of Sister Elizabeth Kenny Foundation, and several others will go to trial in Minneapolis Federal Court Jan. 9.

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*We have printed the entire feature story as Appendix H hereto, App. pp. 107 to 110.

> Lord has characterized the alleged $10 million bilking of Kenny funds as among the 'greatest frauds in American history'."

This type of conduct on the part of a prosecutor was recently the subject of a recommendation of the Presidential Commission to investigate the Assassination of President John F. Kennedy. (See Report, p. 27.) In addition, under Senate Bill 1802 introduced in the first session of the 88th Congress and approved, with changes, by the Judicial Conference of the United States, this conduct would be unlawful and subject the United States Attorney to punishment for contempt of court. (See 109 Cong. Rec. 11743-11744 and 1964 Mid-September Report of the Judicial Conference of the United States, pp. 84-85.) We also call to the Court's attention and ask it to take judicial notice of the recent (April 16, 1965) speech delivered to the Annual Meeting of the American Society of Newspaper Editors by the Honorable Nicholas Katzenbach, Attorney General of the United States, in which he announced limitations on information which federal prosecutors may release to the news media as to pending criminal cases. The statement attributed to the prosecutor at bar was at odds with these self-imposed limitations.

Not to be lost sight of is that during the political campaigns in the Fall of 1962 a few months before the trial cmmenced the pot was kept boiling by the then Attorney General of Minnesota throughout his campaign for reelection. He stressed his part in the revelations concerning the Kenny Foundation as the foremost theme in his speeches, his full page newspaper advertisements and his television and radio spot announcements.*

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* We have printed some of those speeches and announcements in Appendix I hereto App. pp. 110 to 111.

B. THE ACCEPTANCE OF FADELL'S MID-TRIAL CHANGE OF PLEA SERVED TO VIOLATE PETITIONERS' RIGHTS UNDER THE FIFTH AND SIXTH AMENDMENTS.

Petitioners were forced to trial in a community contaminated with adverse publicity and, upon denial of their motion for a severance from the Minneapolis defendants, with a co-defendant, Fadell, who, after posing as a bona fide defendant for three weeks, changed his plea to guilty to but one count of the indictment with the understanding that the other fifteen counts would be dismissed. Upon the prosecutor's representation that Fadell would appear as a witness, the jury was informed over petitioners' objection, of the guilty plea.

Fadell and his counsel participated with petitioners and their counsel in exercising the peremptory challenges that were allocated to all of the defendants as a group. Yet, Fadell was in reality a "spy" in the defendants' camp. Fadell's counsel, during the week preceding the plea (and after the "deal" had been made), freely stipulated to the introduction of evidence. The presence of Fadell and his counsel at the defense table with the full knowledge of the United States Attorney that he was conferring with and assisting him and that United States Attorney and Fadell and his counsel were working out a change of plea agreement (T. 3081, 3147-3150; 3157) denied to petitioners effective assistance of counsel guaranteed by the Sixth Amendment. Compare, *Massiah* v. *United States*, 377 U.S. 201 (1964); *Caldwell* v. *United States*, 205 F. 2d 879 (D.C. Cir. 1953); *Coplon* v. *United States*, 191 F. 2d 749, 757 (D.C. Cir. 1951); *Glasser* v. *United States*, 315 U.S. 60, 76 (1942); *Louie Yung* v. *Coleman*, 5 F. Supp. 702, 703 (S.D. Idaho 1934); and *Ex parte Rider*, 195 Pac. 965 (Calif. Dist. Ct. of Appeals 1920).

Subsequent to Fadell's change in plea the United States Attorney made full use of Fadell's cooperation with the government. He examined witnesses (particularly petitioners on cross examination) concerning alleged meetings and conversations with Fadell. The details of those meettings were carefully conveyed to the jury by the prosecutor's questions. Fadell was not called as a witness nor was there any attempt on the government's part otherwise to prove the alleged meetings and conversations.

C. THE COURT OF APPEALS, IN EFFECT, PUT PETITIONERS TO TRIAL IN THAT COURT AND THUS DEPRIVED THEM OF THEIR RIGHT OF TRIAL BY JURY.

The Court of Appeals held that the District Judge's cautionary instructions to the jury respecting the conduct of the District Attorney had the effect, in its opinion, of disabusing the minds of the members of the jury of the prejudicial effect, if any, of the conduc of the District Attorney; that the competent evidence bearing upon the guilt of petitioners was sufficient to sustain the verdict against petitioners; and that the members of the jury confined themselves to that evidence in considering their verdict.

Faced recently with like considerations in a case involving the effect on a defendant's right of trial by jury of prejudicial conduct on the part of a prosecutor the Supreme Court of Minnesota held that for a reviewing Court to reach the conclusion that cautionary instructions so irrigated the jurors' minds as to dissipate the prejudice, it "* * must hold that the guilt was conclusively proven. [and] This, in effect, is trying defendant in this [the reviewing] court, and depriving him of his right to trial by jury." *State* v. *Flowers,* 114 N.W.2d 78, 81-82 (1962).

Earlier the same court held that it was "unwilling to adopt a theory which in effect assumes that, where proof is strong, due process may be suspended." And that for a court of review to apply the so-called strong evidence of guilt doctrine despite prejudicial conduct on the part of the prosecutor is to erode defendant's basic rights of fair trial and thus "to deny the existence of the right." *State* v. *Reardon,* 245 Minn. 509, 73 NW 2d 192, 195 (1955).

The question is not whether guilt may be spelled out in the record, but whether guilt has been found by a jury according to principles of fair trial appropriate for criminal cases in the federal courts. *Bollenbach* v. *United States,* 326 U.S. 607, 614 (1946).

Whether defendants are guilty is irrelevant to the issue of whether they received a fair trial. *United States* v. *Fry,* 304 (F.2d 296, 298-299 (7th Cir. 1962).

CONCLUSION.

Petitioners respectfully ask that this Court issue its writ of certiorari to the Court of Appeals for the Eighth Circuit to review the judgment of that court entered in this cause.

Respectfully submitted,

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